wrongfully deprived of his property and the policy is to place him *in statu quo* as nearly as possible, he should have returned to him not only the property seized but also the naturally accruing profits and improvements which, it is to be assumed in the ordinary case, would have been earned had the respondent himself, and not the receiver been in charge.[19] If the policy is to secure the receiver above all, why limit his recovery against the respondent to the amount of the profits during the receivership? Either policy is defendable but a position midway between seems without purpose.

SUBROGATION OF ONE PAYING OFF A MORTGAGE TO THE RIGHTS OF THE MORTGAGEE.—In a recent New York case[1] an owner of land executed a first and second mortgage to different parties. Upon foreclosure by the first mortgagee, to which the second mortgagee was made a party defendant, the land was sold for an amount insufficient to discharge the second mortgage debt. The purchaser assigned his bid to the mortgagor who gave a new mortgage to a third party to obtain funds to meet the bid, and the mortgagor received a deed from the referee. Upon foreclosure of the new mortgage, the question arose whether the second mortgage was of legal consequence and if so whether the lien was prior to that of the third party. The court *held* that foreclosure extinguished the second mortgage which, however, was revived by the mortgagor's purchase. The lien, therefore, attached at the same time as that of the new mortgage and since the third party enabled the mortgagor to do the act which caused the revival, he was entitled to priority.

A more accurate analysis shows that the second mortgage was not revived but rather kept alive. Though it would have been extinguished by sale of the land to anyone but the mortgagor, equity will not permit him to hold the property free of a lien he is equitably obligated to pay; the second mortgage thus remained in force and was prior in time to the new mortgage. The effect of the judgment and sale, therefore, was only a redemption of the first mortgage,[2] and the true basis of the third party's claim should be subrogation to the rights of the first mortgagee and consequent priority over those of the second mortgagee.

The doctrine of subrogation, *i. e.*, substitution of one person in place of another as holder of a claim, is one which is purely equitable. "It is a creature of equity courts, invented and applied by them to do justice or prevent an injustice being done in a particular case and under a particular state of facts."[3] Courts, however, are not always mindful of that fact, for we read that, "Subro-

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[19] The court admitted that since "the respondents not only did not consent, but actively opposed" the erroneous receivership, "they could not be required to pay expenses." Therefore the fund plus its profits should be returned undiminished to the respondent. But, proceeds the court, there "is obviously not a profit till his [the receiver's] debts and his own allowances are paid." The last statement is merely a restatement by the court in other language of its conclusion that the receiver has a lien to the amount of the profits realized, since there "is obviously not a profit till his debts, *etc.* are paid" only if the respondent is under a duty to pay them. And that is the question to be decided.

[1] *Duer* v. *Kent Realty Co.* (N. Y. Sup. Ct. 1920) 64 N. Y. L. J. 691.

[2] *Otter* v. *Vaux* (1856) 2 Kay & J. 650.

[3] See *Arlington Bank* v. *Paulsen* (1899) 57 Neb. 717, 747, 78 N. W. 303. It is not to be supposed, however, that courts of law entirely close their eyes to the doctrine of subrogation. "In modern times courts of law have dealt with subrogation as they would with assignments, and when the right of action to which the plaintiff asks to be subrogated is a legal right of action, a court of law may treat a plaintiff who is entitled in equity to subrogation as an assignee and allow him to maintain an action of a legal nature on the claim to which he claims to be subrogated." *Dunlop* v. *James* (1903) 174 N. Y. 411, 415, 67 N. E. 60.

gation is either legal or it arises out of convention or contract . . . Conventional subrogation results from an agreement made either with the debtor or creditor that the person paying shall be subrogated."[4] Such language indicates a confusion of thought arising from the fact that in some cases the presence of an agreement may be a circumstance which equity will take into consideration in determining whether or not it will allow subrogation. It is to be noted that the court says that the agreement may be made "either with the debtor or creditor". If the agreement be made with the creditor, it is plain that the result is nothing more than an assignment, or an agreement to assign enforceable in equity, of either a legal or an equitable *chose* in action. Under no theory, however, can one say that by virtue of an agreement between the debtor and the one claiming to be subrogated, the rights of the creditor are transferred to the latter. The explanation of these statements is that equity considers that the one paying should, in good conscience, have the benefit of the security. The right to subrogation arises by operation of law from the special circumstances of each case and cannot be created by contract.[5]

The inquiry then is to be directed to ascertaining the special circumstances of the instant case which call for an application of the doctrine. In general, one who advances money to pay off a lien upon property should be subrogated to the rights of the original lienor.[6] The true basis is not an agreement, but the right of one advancing money to receive the security upon which he has relied;[7] and the agreement is mere evidence of his anticipation. The principle does not apply, therefore, in favor of an officious volunteer;[8] nor in favor of one who makes the advance upon the general credit of the mortgagor.[9] On the other hand, it is well recognized where the one making the advance has an interest in the property to protect,[10] but it is not limited to such cases.[10a] It is invoked when the advance is made upon the security of a new mortgage which proves to be invalid,[11] or upon the promise of a new mortgage which the owner refuses to execute.[12] It operates to give the new mortgagee priority over incumbrances junior to the one he has paid off of whose existence he was ignorant.[13] In many

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[4] See *First Nat. Bank* v. *Thompson* (1901) 61 N. J. Eq. 188, 193, 48 Atl. 333.

[5] "The right of subrogation is not founded on a contract. It is a creature of equity; it is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties" *Memphis, etc., R. R.* v. *Dow* (1887) 120 U. S. 287, 301, 7 Sup. Ct. 482.

[6] *Title Guarantee & Trust Co.* v. *Haven* (1915) 214 N. Y. 468, 108 N. E. 819; *Gerdine* v. *Menage* (1889) 41 Minn. 417, 43 N. W. 91.

[7] " . . . one who loans his money upon real estate security for the express purpose of taking up and discharging liens or incumbrances on the same property has thus paid the debts at the instance, request, and solicitation of the debtor expecting and believing in good faith that his security will of record be substituted, in fact, in place of that which he discharges is neither a volunteer, stranger, nor intermeddler, nor is the debt, lien, or incumbrance regarded as extinguished, if justice requires that it shall be kept alive for the benefit of the person advancing the money, who thereby becomes the creditor." *Emmert* v. *Thompson* (1892) 49 Minn. 386, 392, 52 N. W. 31.

[8] *Contoocook Fire Precinct* v. *Hopkinton* (1902) 71 N. H. 574, 53 Atl. 797; see *Phelan* v. *Kennedy* (1919) 185 App. Div. 749, 753, 173 N. Y. Supp. 687.

[9] *Kocher* v. *Kocher* (1898) 56 N. J. Eq. 547, 39 Atl. 536; *Heiney* v. *Lontz* (1897) 147 Ind. 417, 46 N. E. 665.

[10] *Fulkerson* v. *Taylor* (1902) 100 Vt. 426, 41 S. E. 863; *Twombly* v. *Cassidy* (1880) 82 N. Y. 155; *Kocher* v. *Kocher* (1898) 56 N. J. Eq. 545, 39 Atl. 535.

[10a] See 3 Pomeroy, *Equity Jurisprudence* (1918) § 1212.

[11] *Crippen* v. *Chappel* (1886) 35 Kan. 495, 11 Pac. 453; *Detroit* v. *Aspinall* (1882) 48 Mich. 238, 12 N. W. 214; *Gans* v. *Thieme* (1883) 93 N. Y. 225; *Emmert* v. *Thompson* (1892) 49 Minn. 386, 52 N. W. 31.

[12] *Baker* v. *Baker* (1891) 2 S. Dak. 261, 49 N. W. 1064.

[13] *Whiteley* v. *Delaney* [1914] A. C. 132, 83 L. J. Ch. 349; *Draper* v. *Ashley*

such cases subrogation has been denied[14] on the ground that the new mortgagee was negligent in not ascertaining the existence of the junior incumbrances.[15] This reasoning seems clearly unsound in the absence of laches. The basis of subrogation is the right of the new mortgagee to receive as security the first lien which he anticipated.[16] When he knows of junior incumbrances, he should protect himself by procuring an assignment of the first mortgage,[16a] or else evidence his anticipation by expressly stipulating that he is to receive a prior lien.[17] Failing to do either, he should be held to have assented and accepted a junior lien as security, and so have no claim to subrogation. But when he is ignorant of the junior incumbrances, regardless of negligence, his anticipation is clearly evidenced by taking a new mortgage which he believes to be a first lien.[18] Negligence has no bearing on the proof of his expectation, and is entirely immaterial where no one has been misled or injured thereby.[19] The junior incumbrancer is not prejudiced in any way by the substitution of a new senior incumbrancer,[20] and should not be permitted to take an unearned advantage of the act of the new mortgagee.

In the instant case it is still more inequitable for the junior incumbrancer to be allowed to contest the right to subrogation. There is no reason for advancing him to the position of a senior lienor, since all he ever contracted for was a junior incumbrance. Not only were his rights not prejudiced by the intervention of the new mortgagee, but they were saved from extinction. It would be grossly inequitable to deny the new mortgagee priority over rights which he has himself kept alive.[21] The courts which deny subrogation when junior in-

(1895) 104 Mich. 527, 62 N. W. 707; *Seeley* v. *Bacon* (N. J. 1896) 34 Atl. 139; *Kent* v. *Bailey* (1917) 181 Iowa 489, 164 N. W. 852; *Home Savings Bank* v. *Bierstadt* (1897) 168 Ill. 618, 48 N. E. 161; *Rachal* v. *Smith* (C. C. A. 1900) 101 Fed. 159.

[14] *Watson* v. *Wilcox* (1876) 39 Wis. 643; *Rice* v. *Winters* (1895) 45 Neb. 517, 63 N. W. 830; *Banta* v. *Garmo* (N. Y. 1844) 1 Sandf. Ch. 383; *Kitchell* v. *Mudgett* (1877) 37 Mich. 81; *Virginia* v. *Chesapeake Canal Co.* (1870) 32 Md. 501; *Fort Dodge Bldg. & Loan Ass'n.* v. *Scott* (1892) 86 Iowa 431, 53 N. W. 283.

[15] *Rice* v. *Winters, supra,* footnote 13, p. 532; *Fort Dodge Building & Loan Ass'n* v. *Scott, supra,* footnote 13, p. 434; but see *Kent* v. *Bailey, supra,* footnote 13, p. 500, expressly distinguishing the *Fort Dodge* case on the ground that negligence must be proved as a fact, not presumed as a matter of law from a mere failure to examine the record, and that negligence, unaccompanied by injury to other parties, is not a ground for refusing equitable relief.

[16] *Supra,* footnote 8.

[16a] 3 Pomeroy, *Equity Jurisprudence* (1918) § 1214. See *Rachal* v. *Smith, supra,* footnote 13, p. 165.

[17] The stipulation or agreement does not in itself confer the right to subrogation. It merely establishes (1) that the new mortgagee is not an officious volunteer, (2) that he did not rely on the general credit of the mortgagor, (3) that he relied on a *prior* lien as security.

[18] The doctrine of constructive notice has no application. The question in issue is his actual expectation, which can be inferred only from his actual knowledge. Constructive notice, which is intended to protect the rights of an equitable lienor, cannot be invoked to increase these rights by imputing to the new mortgagee a knowledge of facts and a consequent expectation which he did not in fact possess. See *Home Savings Bank* v. *Bierstadt* (1897) 168 Ill. 618, 626, 48 N. E. 161.

[19] See *Seeley* v. *Bacon, supra,* footnote 13, p. 141; *Kent* v. *Bailey, supra,* footnote 13, p. 500.

[20] It cannot be argued that the junior incumbrancer has a right to become senior incumbrancer whenever the first mortgage is paid off, as he could then defeat subrogation in every case. His advancement to first mortgagee on extinguishment of the prior lien is a purely fortuitous benefit, to which he has no equitable or legal right. See *Seeley* v. *Bacon, supra,* footnote 13, p. 141; *Draper* v. *Ashley, supra,* footnote 13, p. 531.

[21] In the instant case, the new mortgagee knew of the existence of the

cumbrances are present sanction a totally inequitable result in deference to mistaken principles. It is to be hoped that all jurisdictions will in future follow the doctrine of the present case, which does complete justice to all parties involved and is in accord with the fundamental principles of equity jurisprudence.[22]

THE EFFECT OF KNOWLEDGE THAT A TRANSACTION WITH A CORPORATION IS ULTRA VIRES.—*Ultra vires* acts are generally said by the courts to be "unlawful."[1] Loosely speaking that is true, but it is important to note that "unlawful" does not necessarily mean that the acts involve moral turpitude, are contrary to public policy, or are prohibited by statute; they may be merely beyond the powers granted by the corporation's charter.[2] This distinction is of value in determining the rights of a party who knowingly enters into an *ultra vires* undertaking. According to the courts of some jurisdictions, including the United States Supreme Court, it is impossible for a corporation, which is a mere creature of the state, to enter into or be liable for undertakings which are not expressly or impliedly authorized by the state.[3] The majority of state courts, however, do not apply this strict doctrine; they admit that the *ultra vires* undertaking is unlawful, but hold that a corporation, like an individual, can enter into such an undertaking.[4]

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second mortgage, but it appears that he believed that it had been extinguished by foreclosure and sale. His mistake was, therefore, one of law, not of fact. But the argument that one advancing money should receive the security upon which he relied applies with equal force, and there is no reason to draw any distinction. The majority of courts grant relief against such mistakes of law, particularly when special circumstances strengthen the equitable claim. See *Gerdine* v. *Menage* (1889) 41 Minn. 417, 421, 43 N. W. 91; *Blakerman* v. *Blakerman* (1872) 39 Conn. 320, 326; *Clark* v. *Lehigh Coal Co.* (1915) 250 Pa. St. 304, 312, 95 Atl. 462 (*semble*); (relief will not be given in the absence of special circumstances) 2 Pomeroy, *Equity Jurisprudence* (1918) § 849.

[22] See *Rachal* v. *Smith* (C. C. A. 1900) 101 Fed. 159, 164. "Since the equitable doctrine of subrogation has been ingrafted on the English equity jurisprudence from the civil law, it has been steadily growing in importance and widening in its sphere of application. It is a creation of equity, and is administered in the furtherance of justice." See also 5 L. R. A. (N. S.) 838, 50, L. R. A. (N. S.) 489.

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[1] See *People* v. *Chicago Gas Trust Co.* (1889) 130 Ill. 268, 292, 22 N. E. 798; *State* v. *Nebr. Distilling Co.* (1890) 29 Neb. 700, 715, 46 N. W. 155; *Leigh* v. *Amer. Brake-Beam Co.* (1903) 205 Ill. 147, 151, 68 N. W. 753.

[2] "But the term 'illegal', which is frequently used to describe a contract made by a corporation in excess of its corporate powers, in most cases means simply that the contract is unauthorized, or one which the corporation had no legal capacity to make. Such a contract may be illegal in the true and proper sense, but it may also be one involving no moral turpitude and offending against no express statute. The inexact and misleading use of the word 'illegal', as applied to contracts of corporations, *ultra vires* only, has been frequently alluded to." *Bath Gas Light Co.* v. *Claffy* (1896) 151 N. Y. 24, 35, 45 N. E. 390; see *Bissell* v. *Mich., etc. R. R.* (1860) 22 N. Y. 258, 285; *Day* v. *Spiral Springs Buggy Co.* (1885) 57 Mich. 146, 152, 23 N. W. 628.

[3] *Chewacla Lime Works* v. *Dismukes, Frierson & Co.* (1888) 87 Ala. 344, 6 So. 122; *Downing* v. *Mt. Wash. Road Co.* (1860) 40 N. H. 230; *Central Transp. Co.* v. *Pullman's Palace Car Co.* (1891) 139 U. S. 24, 11 Sup. Ct. 478; *De La Vergne Co.* v. *Germ. Savings Inst.* (1899) 175 U. S. 40, 20 Sup. Ct. 20. Such a doctrine seems inconsistent with a corporation's liability for torts, which today is universal. Clark, *Corporations* (3rd ed. 1916) 242. It cannot be said that a corporation is expressly or impliedly authorized to commit a tort. The inconsistency might, however, be explained by the fact that a party to an *ultra vires* contract acts voluntarily, and to some extent occasions his own injury, whereas in the case of tort he is an involuntary sufferer. *Salt Lake City* v. *Hollister* (1886) 118 U. S. 256, 263, 6 Sup. Ct. 1055.

[4] ". . . corporations, like natural persons, have power and capacity to do wrong . . . While they have no right to violate their charters, yet they have capacity to do so, and are bound by their acts where a repudiation of them